

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

INDUSTRIA LECHERA DE PUERTO RICO, INC.
d/b/a INDULAC

and

Case No. 24–CA–10091

CONGRESO DE UNIONES INDUSTRIALES
DE PUERTO RICO

Shecyl San Miguel, Esq., for the General Counsel.
Fernando A. Baerga Ibañez, Esq., for the Respondent.

DECISION

Statement of the Case

MICHAEL A. MARCIONESE, Administrative Law Judge. I heard this case in San Juan, Puerto Rico on December 12 through 14, 2005.¹ Congreso de Uniones Industriales de Puerto Rico (“the Union”) filed the charge in this case on May 5 and amended it on July 21. The complaint, which issued on August 31 and was amended at the hearing, alleges that the Respondent, Industria Lechera de Puerto Rico, Inc., d/b/a Indulac, violated Section 8(a)(1) and (3) of the Act by discharging employee Orlando Soto on April 1 because of Soto’s union and other protected concerted activities. On September 13, the Respondent filed its answer to the complaint denying that it committed the unfair labor practices alleged and asserting, as an affirmative defense, that it discharged Soto for cause and that it would have taken the same action even in the absence of any union or protected concerted activity. Specifically, the Respondent asserted that Soto was discharged for engaging in violent misconduct when he threatened another employee with bodily harm.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, a corporation, produces milk and other dairy products for wholesale distribution at its facility in Hato Rey, Puerto Rico. The Respondent annually purchases and receives at its Hato Rey facility goods and materials valued in excess of \$50,000 directly from points located outside of Puerto Rico. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

¹ All dates are in 2005 unless otherwise indicated.

II. Alleged Unfair Labor Practices

B. The Evidence

5 The Respondent is a wholesale producer of milk, cheese and other dairy products. Jose Benitez is the Respondent's president. Nancy Santiago has been the Respondent's Director of Human Resources since 1995. The alleged discriminatee, Orlando Soto, was employed by the Respondent in various positions from December 28, 1991 until his termination on April 1. At the
10 time of his termination, Soto was a maintenance employee.

On July 3, 2002, the Charging Party Union was certified as the exclusive collective-bargaining representative of the Respondent's production and maintenance employees. The parties have been in negotiations since then but had not reached agreement on a contract as of
15 the date of the hearing. Prior to this Union's certification, the Respondent's employees had been represented by another Union, Seafarer's International Union ("SIU"). Soto testified, without contradiction or corroboration, that he was the one who brought the Union into the Respondent's facility because of dissatisfaction with the representation provided by SIU. In particular, Soto was unhappy with the way the SIU represented him in connection with a
20 warning he received on September 14, 2001 for allegedly sleeping on the job.² Soto was the Union's observer at the 2002 election and he has been one of three general delegates for the Union since its certification following that election. He has also been one of seven employees on the Union's negotiating committee. According to Soto, he has been the Union's most active and dynamic delegate. Soto testified that he met with Nancy Santiago often in his capacity as union
25 delegate and that these meetings were usually unproductive.

There is no dispute that Soto was involved in an incident with another employee, Hector Orlandi, on March 19. According to Soto, he heard during the morning break that day that Orlandi was saying that someone had shut off the refrigeration equipment Orlandi worked on.
30 Soto viewed Orlandi's comments as an accusation that employees were engaged in sabotage. Soto testified that he went to speak to Orlandi in his role as a union delegate to protect the employees from such accusations. Soto encountered Orlandi by the electrical panel and asked him if it was true what he heard that Orlandi was saying. When Orlandi confirmed that he had said these things, Soto asked Orlandi if he had any proof that someone had turned off the
35 equipment. According to Soto, Orlandi replied that he had no proof but it was true that someone had turned off the freezer. Soto told Orlandi that his comments could have a negative effect on the bargaining relationship because the Respondent would use any accusation of sabotage against the Union.³ Soto testified that Orlandi kept insisting his claims were true even though he had no proof. Soto also testified that Orlandi was speaking in an aggressive manner, raising his voice and gesturing with his hands. Soto asked Orlandi to lower his voice, telling Orlandi that he
40 was only asking a question. Soto testified that once he saw Orlandi's attitude, he knew he wasn't going to get anywhere with Orlandi, so he proceeded to leave.

Soto testified further that, later that morning, he saw Orlandi in the merchandise
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² Soto filed unfair labor practice charges against the Respondent and the SIU over the warning and the Union's alleged failure to represent him. Both charges were dismissed by the Board's Regional Office in December 2001 due to Soto's failure to cooperate in the investigation of his charges.

³ The parties bargaining relationship has been marked by work stoppages and claims of employee sabotage in the past.

receiving area where several other employees were working at the time and that Orlandi was screaming and acting in a furious and rowdy manner. Soto could not understand what Orlandi was saying. He recalled that supervisor Ramon Lugo arrived during Orlandi's tirade. According to Soto, he told Orlandi that he was not going to share anything from the Union's internal affairs with the company and that, if Orlandi had any problem, they could discuss it outside, and that he would not discuss anything with the supervisors. At that point, Adiel Milan, the Respondent's Operations Director, arrived and took everybody into the office. Soto asked to have union representation and was permitted to get fellow delegate Juan Hernandez. Soto went to find Hernandez and returned with him to Milan's office. In addition to Milan, Orlandi, Soto and Hernandez, supervisors Lugo and Gerardo de Jesus, maintenance engineer Mr. Rosario and employees Alberto Santana and Cruz Perez were in the office. Orlandi had brought Santana and Perez in as witnesses.

Soto testified that, in this meeting, Orlandi accused Soto of having threatened him. Soto responded that this was untrue. According to Soto, Santana, one of Orlandi's witnesses, then said that he did not understand what Soto said to be a threat. Cruz Perez asked Soto if he had invited Orlandi to settle things outside and Soto admitted saying this, but explained he meant that internal union matters should not be discussed inside the company but should be resolved outside. After hearing all sides, Operations Director Milan told Soto he had to leave the company. Hernandez, Soto's union delegate, protested that only Soto was being told to leave when both men had been involved in the dispute. According to Soto, Milan then sent both him and Orlandi home. Before leaving the plant, Soto was told that the police had been called and that he could not leave until they arrived and investigated. Soto told Milan that he too would file a complaint with the police. Soto did not testify regarding what happened when the police arrived but he eventually went home. On April 1, the Respondent sent Soto a letter advising him of the Respondent's decision, "after the conclusion of the investigation, ... to permanently separate [Soto] from employment and salary effective this date." The letter does not specify the reason for the decision. There is no dispute that Orlandi was not terminated as a result of the Respondent's investigation.

The General Counsel also called union delegate Hernandez to testify regarding the meeting in Milan's office. Hernandez recalled that Soto came to his area that morning saying that he had been called to Milan's office. Soto told Hernandez that "something small" had occurred between him and Orlandi. Hernandez testified that Soto appeared normal and was not agitated at the time. Hernandez and Soto then went to Milan's office where they found Milan, supervisors Rosario and Lugo, and Orlandi. Hernandez asked what was the purpose of the meeting. Milan replied that Soto had threatened Orlandi. According to Hernandez, Milan did not explain the nature of the threat. Soto then denied threatening Orlandi, telling Milan that he and Orlandi had just been discussing a claim Orlandi was making. Hernandez recalled that Orlandi interrupted Soto, yelling that Soto had threatened him. Milan told Hernandez that Orlandi had witnesses, i.e. Santana and Perez, and Rosario went to get them. Hernandez testified further that Santana and Perez looked surprised when they came into the office. According to Hernandez, when they were asked whether a threat had been made, Santana asked what they meant by a "threat" but no one responded. Perez stated that they had been arguing but at no time was a threat made. After Santana and Perez left the office, Milan told Soto he had to leave. When Hernandez protested, Milan made a phone call to Nancy Santiago. Hernandez recalled there was also a discussion about filing a police report with Soto saying he would do so outside the company. Hernandez and Soto left the office and, after Soto had gone, Milan called Hernandez back and told him that he had decided to send both men home. After this, Soto returned, telling Hernandez that the guards would not let him leave the plant until the police arrived. Hernandez testified that, while waiting for the police, he spoke to Orlandi alone in an effort to resolve the dispute internally and asked Orlandi what had happened. According to

Hernandez, Orlandi said, “something had to be done with that man soon”, referring to Soto. On cross-examination, Hernandez acknowledged that, in his affidavit, Hernandez had stated that Orlandi explained this statement saying “that man is not okay.”

5 Hernandez also testified that, after Soto was sent home, he spoke to other employees in an attempt to find other witnesses to the incident. Although Hernandez claimed that other employees came forward to support Soto’s version of the event, he was able to name only one witness, Victor Vargas. Hernandez conceded that he never told Milan, or any other representative of the company, that Vargas was a witness, even though the Respondent did not
10 finally terminate Soto until April 1, almost two weeks later. The General Counsel also called Vargas to testify. Vargas testified that he witnessed the encounter between Soto and Orlandi from behind a door. He testified that he observed Soto interrogating Orlandi about Orlandi’s accusation of sabotage, with Orlandi refusing to name whom he suspected of this. When Soto persisted in demanding that Orlandi investigate before making such accusations, Orlandi said
15 he was going to go to the boss. Vargas testified that Soto then told Orlandi that they could settle the matter here and now if Orlandi would tell him who turned off the switch and that, if they couldn’t resolve things now, they could resolve it later in the street. There is no dispute that Vargas never conveyed his recollection of the incident to the Respondent.

20 Orlandi, who testified for the Respondent, gave a somewhat different version of the events of March 19. Orlandi has worked for the Respondent about 2½ years in the refrigeration department. One of his responsibilities is to maintain the refrigeration equipment. He testified that the day before this incident, the alarm sounded signifying that the temperature in the cooler was too high. Supervisor Lugo asked him to check it out. According to Orlandi, when he went to
25 the control panel he found that all the switches had been turned off. Orlandi had Lugo see this for himself before returning the switches to their correct position. Orlandi told Lugo that someone had to have turned the switches because they would not have changed position on their own. The next day, March 19, at about 10:00 a.m., Soto came up to him at the electrical panel where he was working. No one else was present at the time. Orlandi testified that Soto
30 approached him in a very hostile, challenging way, gesturing with his hands in Orlandi’s face and standing very close. Orlandi also claimed that there was a strong smell of alcohol on Soto’s breath. According to Orlandi, Soto said that he was going to “break my face”, accusing Orlandi of “playing the company’s game.” Orlandi asked if Soto was threatening him and Soto said he was. Orlandi told Soto he was going to call his supervisor. While Orlandi was on the phone with
35 Lugo, Soto proceeded to walk away, saying to Orlandi that “these issues were solved out in the street, like real men” and that Orlandi “shouldn’t continue playing the company’s game.” On cross-examination, Orlandi acknowledged that, before Soto approached him, there had been rumors around the plant that Orlandi was accusing his co-workers of sabotage. Orlandi also speculated that Soto was angry at him for not confirming an accusation Soto had made several
40 weeks earlier that Supervisor Lugo was harassing employees.

Orlandi testified further that, when he spoke to Lugo on the phone, Lugo told him to go to his office and that Lugo would look for Soto. While waiting outside Lugo’s office, which is in the maintenance shop, Orlandi observed other employees working in the area, including Cruz
45 Perez, whom Orlandi knows as “Tony”, and the electrician, Alberto Santana. Lugo returned from looking for Soto and shortly thereafter, Soto came into the area. While they were standing outside Lugo’s office, Soto repeated his statement that “these issues are solved in the street like men.” According to Orlandi, Soto’s attitude was still belligerent. Lugo told Orlandi to go into his office while Lugo tried to set up a meeting with Milan, the Operations Director. Present for the
50 meeting in Milan’s office, according to Orlandi, were Milan, Lugo, Supervisor de Jesus, Orlandi, Cruz Perez, Santana, and Soto, with Union Delegate Hernandez. Orlandi testified that, in the meeting in Milan’s office, after Orlandi described what had happened when Soto approached

him at the electrical panel, Soto vehemently denied threatening Orlandi. Soto did admit that he told Orlandi that those issues should be solved like men, in the street. According to Orlandi, Soto admitted this only after Santana and Cruz Perez told Milan they had heard him say this. Orlandi told Milan he wanted to file a report with the police over Soto's threat and the police were then called. After the meeting, Orlandi was not allowed to return to work until the Respondent investigated the matter. He returned to work about a week later. While he was out of work, Orlandi provided a written statement, dated March 22, to the Respondent's attorneys. This statement is consistent with his testimony at the hearing.

Respondent also called Cruz Antonio Perez to testify about these events.⁴ Perez, who has worked for the Respondent since 1984, is the dispatcher in the parts storage warehouse. On March 19, Perez was in the maintenance shop with Santana when Orlandi came in a bit agitated followed by the supervisor, Lugo, and followed shortly thereafter by Soto. Perez testified that Soto was agitated and was saying, in a very loud voice, that issues between men should be solved on the street, while pointing at Orlandi. Perez then got between Orlandi and Soto and told Soto that what was happening was not in his best interest, and that Soto should just shut up and lower his tone of voice or he could get in trouble. Soto paid no attention to Perez and continued his behavior toward Orlandi. According to Perez, he then stepped aside, noting that Soto had a slight smell of alcohol about him, as if he had been drinking the day before and was hung over. At that point, Lugo said he was going to see Mr. Milan to solve the matter and Soto said he was going to get his union delegate. After they left the area, Perez returned to his work area in the warehouse. Perez was later called to a meeting in Milan's office where the persons identified above were present. According to Perez, when Orlandi accused Soto of having threatened him, Soto denied it. Perez could not recall anything else that Soto said in the meeting. Specifically, he was unable to recall what Soto said about the invitation to Orlandi to settle the matter in the street. Perez recalled the meeting ending with the Union saying they would take the matter to the next level and Orlandi stating that he would go to the police. Perez also gave a statement to the Respondent's attorneys on March 22, while Soto and Orlandi were on suspension. The statement is essentially consistent with Perez' testimony at the hearing. In the statement, however, Perez recalled that Soto did admit during the meeting in Milan's office that he had said, in the presence of Perez, Santana and Lugo, that "things between men are solved in the street." In his statement, Perez also recited other incidents of alleged bullying by Soto involving him and other employees. Perez was not asked about these incidents at the hearing.

Ramon Lugo, the maintenance supervisor for the utility area since December 2002, testified for the Respondent as well. He corroborated Orlandi's testimony about the incident on March 18 when the alarm went off indicating the temperature in the cooler was too high and that the switch had been turned off. Lugo also confirmed that Orlandi called him at about 10:00 a.m. on March 19 and asked him to come to the cooler area, saying something about Soto.⁵ By the time Lugo got to the area, Soto was gone. Orlandi, who appeared nervous, told Lugo that Soto had threatened him, saying he was going to rip his head off. Lugo took Orlandi to his office to wait while he went to find Soto. Lugo testified that he found Soto in the UHT area of the plant and asked him what happened between him and Orlandi. According to Lugo, Soto seemed surprised, asking what he meant. When Lugo told him that Orlandi had accused Soto of threatening him, Soto denied it. Lugo told Soto that he was going to arrange a meeting with Milan to investigate the matter. Lugo also claimed that he detected a slight smell of alcohol on

⁴ Neither party called Alberto Santana as a witness.

⁵ Lugo testified that he could not make out what precisely Orlandi was saying had happened because the communication was unintelligible. Orlandi was using a cell-phone to call Lugo.

Soto while talking to him.

Lugo testified further that Soto followed him as he walked back to his office and that, as they got to the shop where Orlandi was waiting outside his office, with Cruz Perez and Santana in the same area, Soto said: “problems between men are solved in the street.” He described Soto as appearing agitated while saying this. Lugo then got between Soto and Orlandi, sending Orlandi to his office to wait for a meeting with Milan. Soto left, saying that he was going to find his union delegate. Lugo testified that at the meeting in Milan’s office, Soto denied threatening Orlandi but admitted making the statement about solving problems in the street. According to Lugo, Soto claimed that this statement was not a threat. The meeting ended with Orlandi, and then Soto, each saying they were going to file a police report and with both men suspended pending an investigation. Lugo also gave a statement to the Respondent’s attorney on March 22 as part of the investigation. The statement is essentially consistent with Lugo’s testimony at the hearing with one exception. In the statement, he described the threat reported by Orlandi as Soto telling Orlandi that he was going to “break your face because you are accusing the union workers of sabotage...things are going to be solved in the street...you are making the company’s game.”⁶

Finally, the Respondent called Milan, the Operations Director, to testify about the meeting in his office. Milan testified that he called the meeting after receiving reports of an incident involving the two employees. At first, Soto and Union delegate Hernandez were present with Orlandi, Lugo and de Jesus. Orlandi told Milan that Soto had approached him in the cooler control area and had threatened to take him outside and break his face. Soto responded by saying he didn’t know what Orlandi was talking about, that he did not threaten Orlandi. Milan then asked Orlandi if there were any witnesses and Orlandi mentioned Cruz Perez and Alberto Santana. Milan testified that Cruz Perez, when he came in, said that he was in the shop when Soto and Orlandi came into the area and that he heard Soto tell Orlandi that “these things had to be solved in the street.” When confronted with this, Soto admitted making this statement but claimed it was not a threat. After hearing from the witnesses, Milan asked Orlandi what he wanted to do, if he wanted to pursue the matter. According to Milan, Orlandi said he wanted to file a report with the police.

Milan testified that, while waiting for the police to arrive, he made the decision to send both men home pending an investigation in order to calm things down because of the fact that there was an issue between two employees in the same work group with conflicting versions of what happened. Milan denied that it was Hernandez or the Union that suggested that both Orlandi and Soto be suspended. After the meeting, Milan referred the matter to Nancy Santiago in Human Resources for investigation. Milan also testified that, during the period when the matter was being investigated, he received reports of other incidents involving Soto, including a threat allegedly made to an employee named Cruz Moran that will be discussed later. According to Milan, he referred this information to Santiago to investigate. At the conclusion of the investigation, Santiago informed him that a decision had been made to terminate Soto.

During his direct examination, Milan did not volunteer what, if anything, Santana said when he was called into the meeting as a witness. Nor did the Respondent’s counsel ask Milan about this. On cross-examination, Milan corroborated Soto and Hernandez when he acknowledged that Santana tried to avoid the situation and did not appear pleased to have been called to the office. Milan testified that, when questioned about the incident, Santana asked

⁶ The version in Lugo’s statement is also more consistent with Orlandi’s testimony than what Lugo described at the hearing.

Orlandi what he considered a threat, but he did not confirm that a threat had been made. This testimony is consistent with that of Soto and Hernandez.

Santiago testified that the decision to discharge Soto was made by herself, Milan and the Respondent's president, Benitez, based on the results of the investigation and a review of Soto's entire personnel file. Santiago testified that, as part of the investigation, statements were taken from witnesses, including Orlandi, Cruz Perez and Lugo. No statement was taken from Soto. In addition, Santiago and Benitez interviewed Cruz Moran based on a report she received from Milan indicating that Soto had threatened him as well. According to Santiago, Moran claimed that Soto threatened him in the cafeteria, in January 2004, in the course of a conversation about a union work stoppage. Moran reported that when he indicated to Soto that he intended to work, Soto said, "you know you can get shot." Benitez was also called to testify about his interview with Moran and corroborated Santiago regarding Moran's report. Both Benitez and Santiago testified that when asked to give a written statement documenting the alleged threat, Moran refused to do so. Benitez, in contrast to Santiago, recalled that the information about the threat to Moran came to the Respondent's attention after Soto had been terminated.

The Respondent also subpoenaed Moran to testify at the hearing to verify the alleged threat. However, Moran was uncooperative. While acknowledging meeting with Benitez several times and being asked whether he had an altercation with Soto, Moran would not confirm ever being threatened by Soto. Moran also acknowledged being asked to give a statement against Soto and that he refused. When pressed by the Respondent's counsel, Moran testified that there was "group pressure. Like, they were saying that whoever came in [during a work stoppage] could get – something could happen to them." However, when counsel asked him a leading question whether Soto told him he could get shot if he went to work, Moran responded that he could not remember and that he would be lying if he were to say something. Moran denied that he feared retaliation from Soto if he testified in this proceeding.

According to Nancy Santiago, when the Respondent made the decision to terminate Soto, his entire disciplinary history was considered, as evidenced by documents in his personnel file. These documents, placed in evidence by the Respondent, show that Soto was a problem employee for several years until late 2001. From that point onward, coinciding with the change in Union representation, the only discipline Soto received were warnings and suspensions under the Respondent's absenteeism and tardiness policy. Under the Respondent's policy, which was negotiated with the SIU in 1998 and has continued pending negotiations with the Union, employees receive points for absences, even when medically excused, and a half point for leaving early or arriving late. When an employee has amassed 20 points, he automatically receives a first warning, at 28 points, a second warning, at 35 points, a third warning, at 45 points, a three-day suspension, at 55 points, a five-day suspension and at 60 points, termination. At the end of each calendar year, the employees' points are zeroed out and the system starts anew. From 1997 through 2004, Soto accrued sufficient points to receive discipline up to the 3 and 5 day suspensions, usually in the latter part of the year. He never accrued enough points to be terminated.⁷ Santiago testified that she considered this pattern as evidence that corrective discipline did not work with Soto. She conceded, on cross-examination, that Soto was not alone in this regard and that other employees annually accrued enough points to receive the maximum discipline short of termination.

⁷ There is no evidence how many points Soto had accrued in 2005 before the incident in March for which he was terminated.

The other records in Soto's file, pre-dating the change in unions, reflect conduct that is more troubling. On June 30, 1999, Nancy Santiago wrote a memo documenting a warning she gave Soto for playing jokes on a co-worker of short stature which were deemed inappropriate and led the co-worker to complain to the supervisor. The memo also indicates that Soto did not appear for a meeting with Santiago to discuss the matter. On February 8, 2000, Rafael Santiago, a supervisor and no relation to Nancy Santiago, wrote a memo to Soto's file documenting Soto's habit of leaving his cleaning cart unattended for long periods of time while he was nowhere to be found and of receiving phone calls from outside the plant at about the same time every night at a particular phone in the plant. Rafael Santiago, who testified at the hearing regarding the substance of the memo, answered the phone on one occasion and spoke to a woman who asked to speak to Soto. When Rafael Santiago confronted Soto about his receipt of these phone calls, Soto became defensive and threatened Rafael Santiago for prying into his personal issues. Nancy Santiago testified that she considered this incident when making the decision to terminate Soto because it illustrated his attitude toward management, i.e. that he was above questioning by supervisors regarding his conduct.

Soto's file also contained records of an earlier termination, in March 2000, for allegedly stealing a box of cheese and attempting to run over a security guard who tried to stop him from leaving the plant. Rafael Santiago also testified about this incident because he was the supervisor who caught Soto stealing the cheese. The SIU pursued arbitration of Soto's discharge and the case was settled on August 30, 2000, at the arbitration, when the two security guards who had been witnesses failed to appear at the hearing. Under the settlement, Soto was reinstated without back pay for the 6-7 months he was out of work.

Soto's file also contains records indicating that Soto was caught on the premises in an apparent state of intoxication in April 2001 and June 2001. Wanda Torres, a supervisor, wrote a memo on April 27, 2001 and testified at the hearing regarding an incident where she was called by a security guard who claimed that he found Soto in the parking lot with a can of beer. When de Jesus confronted Soto, she did not see the can of beer and could not tell if he was in fact drunk but she described behavior that would lead one to such a conclusion. Torres sent Soto home because she believed he was in no state to continue working. Soto received no other discipline for this incident. Two months later, after a security guard reported similar behavior suggesting that Soto was under the influence, Nancy Santiago suspended him on July 2, 2001 pending an investigation. When the investigation was concluded, on July 10, 2001, Soto was suspended for an additional 4 days. The Respondent also placed in evidence certified records showing that, in this same period, Soto was arrested for possession of cocaine, on April 25, 2001. These records further reveal that Soto was found guilty of this offense on December 31, 2001 and received a fine at sentencing on May 29, 2002. Soto acknowledged this criminal history at the hearing but claimed that he went through a diversion program under which the conviction was no longer on his record.

The last incidence of discipline in Soto's file, other than the attendance-related discipline described above, was a written warning he received on September 14, 2001 for being found asleep on the job. This is the warning for which he sought representation from the SIU and which led him to file the prior unfair labor practice charges when that Union did not pursue his grievance over the warning.

When confronted with his disciplinary record at the hearing, Soto claimed he was unaware of most of the documents in his file and that he knew nothing about the events described in the documents. However, he did acknowledge having been fired previously and having received the warning in September 2001 which led him to seek a change in union representation.

The General Counsel offered evidence at the hearing in an attempt to show that Soto was treated differently than other employees for engaging in similar conduct. Jaime Torrez, a 30-year employee on medical leave at the time of the hearing, testified that he had a verbal confrontation with then-supervisor Kermit Pagan about three years ago. According to Torrez, Pagan ordered him to perform a task he was unable to do because of a medical condition. When he refused, Pagan became disrespectful towards him and Torrez responded in kind. The situation escalated to the point that the two men were about to fight but were prevented from doing so by other employees. Torrez testified that, at one point, he invited Pagan to settle their dispute outside, after 3:00 p.m. Torrez testified further that he received no discipline as a result of this incident. On the contrary, Pagan apologized to him a few days later. Torrez conceded on cross-examination that no report of this incident was made to Nancy Santiago.

Torrez also testified about an incident around the same time as the one above, when he and co-worker Carlos Berrios had an altercation after Torrez teased Berrios about drinking. Torrez testified that he and Berrios used foul language and even assaulted one another before supervisor KiKi Valencia and co-workers separated them. Again, Torrez received no discipline for this. At most, Valencia told the two men to settle their dispute or they would be fired. Torrez acknowledged that neither he nor Berrios complained to management about the other's behavior. Berrios, who was called as a witness by the General Counsel, was not asked to corroborate this testimony. The Respondent called the supervisor, Valencia, who claimed the incident never happened.

Torrez testified to a third incident, about a year and a half before the hearing, when he witnessed a confrontation between Israel Hernandez and Orlandi. According to Torrez, Hernandez was angry at Orlandi for accusing him of shutting off a breaker and threatened to break Orlandi's neck. Hernandez was about to assault Orlandi when Torrez intervened and took Hernandez outside to calm down. Although Torrez claimed that supervisor Ramon Lugo was present, he acknowledged on cross-examination that Hernandez only uttered the threat to Torrez. Again, there is no evidence that this incident was brought to the attention of the Respondent's Human Resources Department.

The General Counsel called Berrios as a witness to testify about an incident he had with another employee Carlos Agosto on or about June 13, 2004. The incident occurred the day after a work stoppage by employees in support of the Union. When Berrios questioned Carlos Agosto why he had gone to work instead of honoring the work stoppage, Carlo Agosto became upset. After exchanging words, Carlos Agosto told Berrios that, if he had a problem with Agosto, they could go outside and solve it like men, with fists. Berrios testified that Carlos Agosto said this as he walked outside and Berrios followed him. On the way out, they encountered Carlos' brother, Francisco Agosto, who, upon learning of his brother's plans to fight Berrios, convinced Carlos to go with him to the office of Pedro Trinidad, the Respondent's Operations Director at the time. Berrios went outside to have a cigarette and heard his name paged to come to Trinidad's office. Berrios went to Trinidad's office with his delegate, Juan Hernandez. Berrios testified that he and Berrios were still antagonistic during the meeting in Trinidad's office, with Carlos Agosto brazenly stating his desire to go outside and fight Berrios. When Berrios indicated his willingness to fight, Trinidad told the men to calm down, that there would be no fighting or they would both be thrown out. By the end of the meeting, tempers had calmed and neither Berrios nor Carlos Agosto received any further admonishment for this incident.⁸ Hernandez also

⁸ On cross-examination, Berrios testified that he had no intention of complaining to management about Agosto's calling him outside to fight. According to Berrios, the "policy"

Continued

testified about his involvement in the Berrios-Agosto dispute. He corroborated Berrios testimony that Berrios and Carlos Agosto were still agitated and looking to fight during the meeting but that Trinidad was able to calm things down.

5 The Respondent called the Agosto brothers to testify about this incident. Carlos Agosto confirmed Berrios' testimony that he had an argument with Berrios over Berrios' questioning him about his participation in a work stoppage, but claims it was Berrios who invited him outside to fight. Carlos Agosto also confirmed the testimony that his brother, Francisco, stopped him on the way out and convinced him to bring the dispute to the attention of Trinidad. Carlos Agosto
10 denied, however, that Berrios' invitation to fight was mentioned during the meeting in Trinidad's office. According to Carlos Agosto, he only complained to Trinidad about Berrios' being disrespectful toward him. He did not tell Trinidad that Berrios invited him outside because he did not want to get Berrios in trouble. Francisco Agosto corroborated Carlos in this regard, testifying that he was not even aware that Berrios wanted to fight his brother until after the meeting.

15 Finally, General Counsel called Wilberto Burgos, who has been employed by the Respondent since 1991, to testify about an incident that occurred 5-6 years earlier in which he and a subcontractor's employee known as "Grumpy" pushed each other and nearly came to blows before other employees intervened to stop them from fighting. After they were separated,
20 Supervisor Gerard Santiago came in. According to Burgos, the supervisor told him that this could not happen again. Burgos received no discipline as a result of this incident.

In addition to the testimony of the witnesses described above, the General Counsel cites evidence from the Respondent's personnel records regarding one other employee with an
25 extensive disciplinary record who had not been terminated by the Respondent.⁹ Employee Jose del Valle's personnel folder contains the following disciplinary history:

- April 12, 2005 suspension for three days for failing to verify a machine for which he was responsible.
- 30 • January 7, 2005 suspension for three days for leaving work area without permission.
- August 7, 2004 suspension for three days for taking excessive breaks and being disrespectful to a supervisor.¹⁰
- 35 • July 12, 2004 memo to file prepared by the Respondent's finance director and a note indicating that del Valle's wife called the company about a threat of sabotage.
- December 19, 2003 suspension for three days under the Respondent's attendance policy.
- 40 • November 11, 2003 suspension for three days after being found asleep during working hours.

In addition to the Absenteeism and Tardiness policy described above, the Respondent

45 among employees is to settle such disputes among themselves without getting the Respondent involved.

⁹ At the hearing, Counsel for the General Counsel questioned Nancy Santiago about the disciplinary records of several other employees. However, she does not cite these other employees in her brief as evidence of disparate treatment.

50 ¹⁰ The English translation of del Valle's alleged insult of his supervisor reflected in the transcript is unclear but suggests he was calling his supervisor stupid.

maintains a set of disciplinary rules and procedures, which are in evidence. These rules specify various levels of discipline for different types of misconduct. Under these rules, some types of misconduct would warrant discharge for the first offense, such as stealing, falsifying company records, or introducing, possessing or using illicit drugs on company property. Other types of misconduct are subject to progressive discipline, such as gambling on company premises, violating parking regulations, misusing company bulletin boards, or unauthorized solicitation. A third category of rule violations do not specify a particular level of discipline. For these offenses, which include disrespecting coworkers or members of management or threatening to assault a co-worker, member of management or client, the rules provide that “the disciplinary measure will depend on the facts of each situation and can include discharge.”

B. Analysis and Conclusion

The sole issue in this case is whether the Respondent, in terminating Soto on April 1, was motivated by any union or protected concerted activity engaged in by Soto. In *Wright Line*,¹¹ the Board held that, in cases where employer motivation is the issue, the General Counsel must first establish, by a preponderance of the evidence, that union or protected concerted activity was a “motivating factor” in the decision to discharge an employee. In order to meet his initial burden, the General Counsel must show that the employee was engaged in protected activity, that the employer was aware of this activity, and that the employer exhibited animus against such activity. See also *Naomi Knitting Plant*, 328 NLRB 1279 (1999); *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). Only if the General Counsel has made the requisite showing will the burden shift to the Respondent to “demonstrate [by a preponderance of the evidence] that the same action would have been taken even in the absence of the protected conduct.” *Wright Line*, 251 NLRB supra, at 1089. See also *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983). Where an employer asserts, as here, that some type of employee misconduct was the reason for discharge, the employer “does not need to prove that the employee *actually* committed the alleged offense. It must show, however, that it had a *reasonable belief* the employee committed the offense, and that the employer acted on that belief in taking the adverse action against the employee.” *Midnight Rose Hotel & Casino*, 343 NLRB No. 107 (December 16, 2004). See also *Doctors’ Hospital of Staten Island, Inc.*, 325 NLRB 730, fn. 3 (1998) and cases cited therein.

There is no dispute that Soto was a union delegate and a member of the Union’s negotiating committee and that the Respondent was at least aware of his status as such. As for Soto’s testimony that he was the individual who brought the Charging Party into the Respondent’s facility to replace the SIU, there is no evidence in this record that Respondent was aware of his role in the organizing campaign. As for Soto’s self-serving testimony that he was the most active and dynamic of the Union’s three delegates, there is no objective evidence in the record to support this claim and I attach little weight to it. There is also no independent evidence in this record of any animus toward either Soto in particular or the Union in general.

The General Counsel, acknowledging the absence of direct evidence of animus, relies instead on circumstantial evidence to prove that Respondent was motivated by Soto’s union activity when it discharged him. In the cases cited by the General Counsel and other decisions, the Board has repeatedly stated that animus and unlawful motivation may be inferred from circumstances such as timing, the failure to adequately investigate alleged misconduct, and disparate treatment. See *New Otani Hotel & Garden*, 325 NLRB 928, fn. 2 (1998); *Adco Electric*,

¹¹ 251 NLRB 1083, 1089 (1980), enf’d. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S.989 (1982).

307 NLRB 1113, 1128 (1992), enfd. mem. 6 F.3d 1110 (5th Cir. 1993); *Electronic Data Systems Corp.*, 305 NLRB 219 (1991); *Visador Co.*, 303 NLRB 1039, 1044 (1991); *Asociacion Hospital Del Maestro*, 291 NLRB 189, 204 (1988); *Clinton Food 4 Less*, 288 NLRB 597, 598 (1988). The Board, in evaluating the circumstances of an employee's discipline or discharge to determine motivation, will often look for a nexus between protected activity and the employer's action.

The only evidence in the record showing a connection between Soto's union activity and his discharge is his testimony regarding his reason for speaking to Orlandi on March 19. Soto's claim that he wanted to question Orlandi about the rumors that Orlandi was accusing his co-workers of sabotage supports a finding that he was engaged in protected activity, at least initially. I note that Soto's testimony that this was his purpose in speaking to Orlandi that morning is corroborated to some extent by Orlandi, who acknowledged being aware of these rumors and admitted telling his supervisor the day before that he believed someone deliberately turned off the switches for the cooler. Moreover, the comment that Orlandi claims Soto made, i.e. that Orlandi "was playing the company's game" suggests the concerted nature of Soto's encounter with Orlandi. Because there is evidence in the record that issues of employee sabotage had been raised before in the course of the parties' bargaining, I find that Soto had a reasonable basis to be concerned, as a union delegate, with the impact of Orlandi's statements on bargaining unit employees. Based on this evidence, I find that Soto was engaged in concerted union activity when he initially confronted Orlandi on March 19 at the electrical panel.

It is unclear from the evidence in the record, however, whether the Respondent was aware, when it investigated the incident, that Soto was engaged in union or other concerted activity during the incident with Orlandi. The Respondent began its investigation in response to a complaint from Orlandi that Soto had threatened him. There is no evidence that Orlandi told either Lugo or Milan that the threat was made in connection with Soto's investigation of rumors of sabotage. Moreover, when Soto was questioned in Milan's office about the alleged threat, he did not volunteer the purpose of his questioning of Orlandi. He merely explained to Milan that his statement to Orlandi about settling things outside meant that he did not want to discuss internal union matters in the presence of supervisors. He did not specify in this meeting what internal union matters he wanted to settle with Orlandi. Similarly, union delegate Hernandez did not mention in this meeting that Soto was investigating any matter for the Union. He merely recalled that Soto, in denying that he threatened Orlandi, told Milan that he and Orlandi had been discussing a claim Orlandi was making. I can not find, on the basis of this evidence, that Respondent was aware of the concerted nature of Soto's interaction with Orlandi on March 19.

Even assuming Respondent was aware that Soto was investigating rumors of employee sabotage when he approached Orlandi, this would not insulate Soto if he in fact threatened Orlandi in the course of their interaction.¹² In this regard, I credit Orlandi over Soto. I saw nothing in Orlandi's demeanor, and General Counsel has not pointed anything out, that would cause me to believe that Orlandi was not being truthful when he testified that Soto threatened to "break his face". On the other hand, Orlandi's history, albeit somewhat distant from this event, suggests he had a tendency to resort to threats and bullying in his dealings with other employees and management. Moreover, his demeanor on the witness stand did not convince me he was being truthful regarding his encounter with Orlandi. Soto's feigned ignorance when confronted with records of past misdeeds did not instill confidence in the reliability of his

¹² If the Respondent discharged Soto in the mistaken belief that he engaged in misconduct in the course of protected concerted activities, then the rationale of *NLRB v. Burnup & Sims*, 379 U.S. 21, 23 (1964) would apply. See also *Ideal Dyeing & Finishing Co.*, 300 NLRB 303 (1990). The General Counsel has not advanced this theory of a violation.

testimony. Soto also tended to be evasive and argumentative in response to questions from counsel for the Respondent.

In addition to the threat made by Soto in his one-on-one encounter with Orlandi, there is no dispute that, in the presence of supervisor Lugo and other employees, Soto invited Orlandi to settle their dispute, “like men, in the street.” Orlandi’s testimony in this regard was corroborated by Lugo and Cruz Perez, whom I found to be credible witnesses. In fact, Soto acknowledged that he admitted making such a statement in the meeting in Milan’s office, although he explained that he merely meant that internal union matters should be resolved outside the jurisdiction of the employer. The expression used by Soto is apparently a common one among the Respondent’s employees and all employees understand its true meaning, i.e. that such personal disputes should be resolved through fighting outside the Respondent’s premises. Based on the credited testimony of Orlandi and Soto’s admission, I find that the Respondent had a reasonable belief that Soto threatened Orlandi on March 19.

The preponderance of the evidence thus establishes that the Respondent discharged Soto, a union delegate, after he was admittedly involved in an incident with another employee where the evidence presented to the Respondent suggested that Soto had threatened an employee with physical assault. The General Counsel’s argument that the Respondent was motivated, not by any threat made by Soto to Orlandi but by his union activity, is based primarily on its claim that Soto was treated differently than other employees who engaged in similar conduct. I find that the General Counsel has not met her burden of proof on this issue.

The records from employee del Valle’s file, showing a series of suspensions for various misconduct, are not evidence of disparate treatment. None of the misconduct for which del Valle received discipline involved threatening conduct toward other employees. As for the various incidents described by General Counsel’s witnesses, the testimony as to some was conflicting. Even assuming General Counsel’s witnesses were all credited, the fact that none of the employees who testified received any discipline for allegedly threatening or fighting with co-workers does not establish that the Respondent was discriminatorily motivated when it decided to terminate Soto for his conduct toward Orlandi. The General Counsel has not demonstrated that any of these employees had the kind of disciplinary history that Soto had. Moreover, in Jaime Torrez’ case, his invitation to supervisor Pagan to settle things outside was apparently provoked by Pagan, as suggested by Pagan’s apology to Torrez a couple days later. The incident between Torrez’ and long-time friend Berrios, who did not even corroborate the testimony, emanated from horseplay that got out of hand. As to the incidents between Orlandi and Hernandez, Berrios and Carlos Agosto, and Burgos and “Grumpy”, it is not clear from the record whether the Respondent’s managers were aware of all the facts since none of the employees pursued complaints against each other. The incident on March 19 which led to Soto’s discharge, in contrast, involved an unprovoked threat directed at an employee who complained to his supervisor where there was no evidence to suggest that the incident involved simple horseplay or other harmless bantering among employees. Soto’s admission in Milan’s office, that he had invited Orlandi to settle their dispute in the street, when considered in the context of Soto’s history of threatening and bullying conduct toward other employees and supervisors, made this situation substantially different from the situations cited by General Counsel. See *New Otani Hotel & Garden*, 325 NLRB supra, at 941-945.

Based on the above, and the record as a whole, I find that the General Counsel has not met its burden under *Wright Line*, supra, of proving that any union or protected activity was a motivating factor in Soto’s discharge. In particular, I note the absence of any direct evidence of animus or of any nexus between known union activity and the decision to discharge Soto. I also note the absence of any evidence of blatant disparate treatment or other circumstance from

which one could infer unlawful motivation. The evidence establishes that Respondent was motivated solely by what it reasonably perceived to be serious misconduct engaged in by Soto directed at another employee. Even assuming General Counsel had proved a prima facie case of discrimination, I would find that the evidence here is sufficient to meet the Respondent's burden of proving that it would have discharged Soto for threatening Orlandi even absent any union activity. Accordingly, I shall recommend that the complaint be dismissed in its entirety.

Conclusions of Law

By discharging Orlando Soto on April 1, 2005, the Respondent has not engaged in any unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹³

ORDER

The complaint is dismissed.

Dated, Washington, D.C.

Michael A. Marcionese
Administrative Law Judge

¹³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.